EXHIBIT
A

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Cbeyond Communications, LLC	**)**	
	)	
vs.	**)**	
	)	**11-0696**
Illinois Bell Telephone Company,	**)**	
d/b/a AT&T Illinois	**)**	
	)	
Formal Complaint pursuant to Sections	**)**	
13-515 and 10-108 of the Illinois Public	**)**	
Utilities Act.	**)**	

ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

By the Commission:

On October 5, 2012, Cbeyond Communications, LLC ("Cbeyond") filed a four-count Second Amended Complaint. Illinois Bell Telephone Company ("AT&T") subsequently filed a combined 2-615 and 2-619 Motion to Dismiss. For the reasons stated herein, this Motion is granted in part and denied in part.

An Administrative Law Judge's, (""ALJ's") ruling issued on August 31, 2012, granting, in part, AT&T's previous motion to dismiss Cbeyond's First Amended Complaint but allowing Cbeyond leave file a Second Amended Complaint. On October 5, 2012, Cbeyond filed its Second Amended Verified Formal Complaint ("2nd Am. Complaint"). AT&T's combined motion to dismiss followed.

I. Jurisdiction

Both Cbeyond and AT&T are "telecommunications carriers" within the meaning of 220 ILCS 5/13-202 and 5/13-203. The Commission has the authority to regulated telecommunications carriers pursuant to 220 ILCS 5/4-101. The Commission has jurisdiction to address non-compliance with interconnection agreements approved by this Commission pursuant to 47 U.S.C Sec. 252.

II. The Facts Asserted in the Second Amended Complaint

Cbeyond alleges the following pertinent facts in its Second Amended Complaint:

Cbeyond purchases DS1 circuits as part of a combination of UNEs (Unbundled Network Elements) called either DS1/DS1 Enhanced Extended Loops ("EELs") or DS1/DS3 EELs from AT&T. Some of these circuits come with Clear Channel Capability (what Cbeyond refers to as "CCC") and some do not. Some of the circuits that do not

have Clear Channel Capability need to be refurbished by AT&T to achieve Clear Channel Capability. Neither party provided information establishing what Clear Channel Capability does for Cbeyond or for its customers.

In Commission Docket 02-0864, which is, *Illinois Bell Telephone Co., Filing to increase Unbundled Loop and Nonrecurring Rates,*[1] AT&T witnesses testified that when Clear Channel Capability is requested at the time when a circuit is installed, the CCC rate would not apply. In fact, the charges for the installation of Clear Channel Capability are already included in the relevant installation charges for these circuits. However, when Cbeyond purchases DS1 EELs from AT&T that are formatted with Clear Channel Capability, AT&T nevertheless bills Cbeyond for the CCC non-recurring provisioning charge. 2nd Am. Complaint at 1-3. In other words, Cbeyond alleges that AT&T bills for work that was already performed, *to wit*-the conditioning of circuits to perform Clear Channel Capability. Also, when Cbeyond purchases new DS1 circuits to be connected to previously-installed DS1/DS3 EELs, AT&T bills Cbeyond for provisioning CCC in those circuits.

Cbeyond has disputed the legitimacy of AT&T's practice of charging for Clear Channel Capability for new circuits, but the parties are at an impasse. Cbeyond avers that it does not challenge the findings made in the final Order in Docket 02-0864 and it does not challenge the CCC charge imposed on it when Cbeyond asks AT&T to change an already-installed circuit to Clear Channel Capability. *Id.* at 4.

a. Docket 10-0188

In 2010, Cbeyond attempted to litigate a portion of this dispute (what AT&T calls, and what will be referred to herein, "Category 1" charges) as well as others by filing *Cbeyond Communications, LLC -vs- Illinois Bell Telephone Company, a Formal Complaint and Request for Declaratory Ruling pursuant to Sections 13-515 and 10-108 of the Illinois Public Utilities Act,* Docket 10-0188. In its Second Amended Complaint here, Cbeyond acknowledges that, in Docket 10-0188, it raised a "concern" regarding charging CCC for DS3 transport. According to the Second Amended Complaint, Cbeyond complained in Docket 10-0188 that AT&T was charging Cbeyond for a new UNE loop when Cbeyond ordered a change in the UNE transport portion of an existing DS1/DS1 EEL into a DS1/DS3 EEL. Such a process is referred to therein as an EEL "rearrangement." 2nd Am. Complaint at 5, 6. The Commission dismissed the Complaint in Docket 10-0188, determining, essentially, that Cbeyond failed to establish illegal conduct or conduct in breach of the parties' contract on the part of AT&T.

Cbeyond further stated that the Clear Channel charges at issue in Docket 10-0188 all applied to new DS3 transport orders, not DS1 transport orders, which, it avers, is raised in this case for the first time. Cbeyond further states that two new issues are raised here that were not raised in Docket 10-0188. These issues are: a) whether CCC charges were "appropriately" applied to new DS1 circuits riding on DS3 transport in the

[1] Docket 02-0864 set TELRIC (Total Element Long Run Incremental Cost) pricing for various unbundled network elements that AT&T would sell to Competitive Local Exchange carriers like Cbeyond.

context of a DS1/DS3 EEL rearrangement;[2] and b) if AT&T could apply CCC changes to new DS1 circuits provided as part of new DS1/DS1 EELs, were they applied "appropriately?" *Id*. at 6, 7.

It concluded that there are issues in this case regarding specific billings which were not addressed in Docket 10-0188 and which the Commission specifically stated in the final Order in that Docket were outside the scope of that case. Cbeyond, however, cites no portion of the final Order in Docket 10-0188 to support this averment. These allegedly un-litigated issues concern specific application of the CCC rate to new DS1 circuits riding on DS3 transport, (both in the rearrangement context as well as going forward) which, according to Cbeyond, were not addressed in Docket 10-0188. Also, there are new issues regarding past and future application of the CCC rate to new DS1 circuits provisioned as a DS1/DS1 EEL, which were not addressed in Docket 10-0188. *Id.* at 7. Additionally, according to Cbeyond, the final Order in Docket 10-0188 did not approve AT&T's practice of billing the CCC rate on either the specific charges at issue in that docket or for new charges being assessed by AT&T on DS1 or DS3 transport that was provisioned since the filing of the complaint. *Id.* at 17.

Cbeyond contended that AT&T continues to misapply the CCC rate to orders for new DS1 circuits riding on multiplexed UNE DS3 transport (DS1/DS3 EELs) and on new DS1/DS1 EEL circuit orders. Further, AT&T and Cbeyond agreed on August 29, 2011, that "any unresolved issues remaining in dispute over billings arising from EEL rearrangements" litigated in Docket 10-0188, which the parties could not resolve by negotiation, would be brought to this Commission by Complaint no later than October 24, 2011. Cbeyond allegedly paid AT&T the vast majority of the amounts in dispute in Docket 10-0188; however, it states that there remains an unspecified dispute over the "proper" application of the CCC rate, both as to the amounts involved in Docket 10-0188 and to other amounts in dispute between the parties. *Id.* Cbeyond avers that the manner in which AT&T has billed it violates various portions of the Interconnection Agreement (contract) between itself and AT&T, including, but not limited to, Section 1.55, regarding unbundled network elements, Section 9.1.1, which provides for non-discriminatory access to unbundled network elements, Sections 9.3.3.4 and 9.7, which require that rates for unbundled network elements shall be charged according to the pricing schedule. *Id.* at 18-19.

Cbeyond also maintained that "[i]n addition to the "rearrangements" dispute in Docket 10-0188, Cbeyond has further challenged and disputed all CCC charges that were not time-barred pursuant to the terms of the Interconnection Agreement between the parties." Those disputes, Cbeyond continues, were not reviewed in Docket 10-0188. *Id.*

b. The Legal Theories Asserted in the Second Amended Complaint

In Count I of the Second Amended Complaint in the matter at bar, Cbeyond asserted that AT&T knowingly continues to misapply the CCC rate. By unreasonably

[2] Cbeyond does not state why it asserts that "appropriate" conduct is a legal standard for this Commission to apply.

failing to offer network elements that this Commission and the Federal Communications Commission (the "FCC") have determined must be offered on an unbundled basis in a manner that is consistent with the Commission's or the FCC's orders or rules, AT&T, allegedly, has violated Section 13-514(10) of the Public Utilities Act, 220 ILCS 5/13-514(10). 2nd Am. Complaint at 20-21. In Count II, Cbeyond points out that Section 13-801(g) of the Public Utilities Act requires that "Interconnection, collocation, network elements, and operations support systems shall be provided by the incumbent local exchange carrier to requesting telecommunications carriers at cost based rates . . ." It asserts that the manner in which AT&T applies the CCC rates results in double-compensation to AT&T for seven (unspecified) activities that it does only once. Cbeyond concludes that by billing for services that it is not providing, AT&T violated Section 13-801(g) of the Public Utilities Act, 220 ILCS 5/8-801(g). *Id.* at 21.

In Count III, Cbeyond asks this Commission to commence an investigation into AT&T's practices regarding billing for CCC. It averred that AT&T does not bill its retail Illinois "fractional" DS1 customers for Clear Channel Capability. In Count IV, Cbeyond alleged that AT&T's practices are in breach of a final Order issued by this Commission incorporating the UNE prices from Docket 02-0864 into the Interconnection Agreement between AT&T and Cbeyond. Cbeyond acknowledges that, pursuant to that contract, it is time-barred from recovering overcharges that date back more than two years from the date of the dispute regarding CCC charges. It seeks a Commission Order setting forth the correct application of CCC charges going forward and directing AT&T to issue bill credits for all CCC non-recurring charges that were disputed by Cbeyond within two years from the bill date dispute time limit in the parties' Interconnection Agreement. *Id.* at 22-23.

III. AT&T's Motion

AT&T's Combined Section 2-619.1 Motion to Dismiss is comprised of two sub-parts. First, AT&T attacks all four counts of Cbeyond's Second Amended Complaint arguing that: (1) in the ALJ ruling in this proceeding made on August 31, 2012, dismissing Cbeyond's First Amended Complaint, the ALJ did not grant Cbeyond leave to amend its claim of CCC charges "associated with the 'rearrangement' or 'grooming' of existing DS1/DS1 EELs;" (2) the Commission already decided the issue of CCC rate in Docket 10-0188, and thus Cbeyond is barred from raising the same dispute again; (3) that the parties' interconnection agreement ("ICA") controls the billing dispute in question, and state or federal law does not control; (4) that Count II, the violation of Section 13-801(g) claim, should be dismissed for another ground, because as an "electing provider" under Section 13-506.2 of the Public Utilities Act, AT&T cannot be subject to Section 13-801 of the Act; and (5) that Cbeyond's breach of contract claim is meritless, because AT&T provided and charged the CCC rate at the price set forth in the parties' ICA. Although not stated expressly, AT&T's Section 2-619 arguments concern Section 2-619(a)(9) – a catchall provision that bars plaintiff's claim by any "affirmative matter."

AT&T also attacks the legal sufficiency of Counts I, II, and III of the Complaint pursuant to Section 2-615 of the Code of Civil Procedure. Particularly, AT&T argues

that those three counts should be dismissed because Cbeyond's latest version of its Complaint did not "cure the defect" addressed in the ALJ ruling on August 31, 2012, which dismissed these counts for lack of factual allegations indicating that AT&T violated any law. Motion at 32. Additionally, AT&T asserts that with respect to Count II, Cbeyond failed to state a claim for violation of Section 13-801 of the Act. *Id.* at 33.

a. The Applicable Legal Standards

As a general rule, when determining the sufficiency of a complaint, a trier of fact must take the petitioner's well-pleaded facts as true and interpret the allegations of the complaint in the light most favorable to the plaintiff. *Heastie v. Roberts*, (2007) 226 Ill. 2d 515, 530, 877 N.E.2d 1064; *Storm & Associates, Ltd. v. Cuculich*, (1st Dist. 1988) 298 Ill. App. 3d 1040, 1057, 700 N.E.2d 202. A claim "should not be dismissed unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery." *Heastie,* 226 Ill. App. 3d at 531.

A Section 2-615 motion attacks the sufficiency of a complaint; it raises the question of whether the plaintiff states a claim upon which relief can be granted. *Storm & Associates, Ltd.,* 298 Il App. 3d at 1046-47. Also, factual defenses are not available under a motion to dismiss brought pursuant to section 2-615, and the trier of fact may consider the legal sufficiency of the complaint based only on the allegations in the complaint and not upon affidavits or other supporting materials. *Premier Elec. Const. Co. v. La Salle Nat. Bank*, (2nd Dist. 1983) 115 Ill. App. 2d 638, 641, 450 N.E.2d 1360.

On the other hand, a motion to dismiss brought under Section 2-619 raises certain defects or defenses to the complaint and asserts that the respondent is entitled to judgment as a matter of law. *Storm & Associates,* 298 Ill. App. 3d at 1048. If the grounds for a Section 2-619 motion do not appear on the face of the pleading attacked, such motion shall be supported by affidavit. 735 ILCS 5/2-619(a)(1)-(9).

b. The Section 2-619 Arguments

1. That Cbeyond Is Barred From Amending Its Claim As To the Category 1 Charges

AT&T's first Section 2-619 argument is that Cbeyond is "not entitled to assert a challenge to the Category 1 Charges" for two reasons: (1) Cbeyond was not granted leave to amend to include its Category 1 charges claim, in view of the ALJ's ruling on August 31, 2012, and (2) even if Cbeyond was granted leave to amend to add this claim, its challenge to the Category 1 charges claim should be dismissed, because the Commission already ruled on the matter in favor of AT&T in Docket 10-0188. Motion at 11-18. According to AT&T, "Category 1 charges" represent CCC charges arising out of "rearrangement" of existing DS1/DS1 EELs, including orders of new DS1 circuits riding on such existing EELs.

AT&T argues that Cbeyond cannot raise the issue of the Category 1 charges here because that issue was already decided by the Commission in a final Order in

Docket 10-0188. The central point of AT&T's averment is that, although the doctrines of *res judicata* and collateral estoppel appear to have no effect on the Commission orders, Cbeyond's challenge to the Category 1 charges is "barred by the collateral attack doctrine." Footnote 8 to Motion at 13, Motion at 14. In connection with this argument, AT&T addresses three distinct legal doctrines: *res judicata*, collateral estoppel, and collateral attack.

Res judicata or claim preclusion is a doctrine that precludes the re-litigation, outside the normal rehearing or appeal, of a judgment that was rendered by a court of a competent jurisdiction between the same parties involving the same cause of action. *Hayes v. State Teacher Certification Bd.*, (5th Dist. 2005) 399 Ill. App. 3d 1153, 1161-62, 835 N.E.2d 146. Similar to *res judicata* but distinguishable is the doctrine of collateral estoppel, also known as issue preclusion. Collateral estoppel differs from *res judicata* in that it "bars the relitigation of particular *facts* or *issues* decided in a prior adjudication between the same parties *in a different cause of action.*" *Metro Util. Co. v. Illinois Commerce Comm'n.*, (2nd Dist. 1994) 266 Ill. App. 3d 266, 270, 634 N.E.2d 377 (emphasis added). The three requirements of collateral estoppel are: (1) the issues in the cases are identical, (2) there is a final judgment on the merits, and (3) the party against whom an estoppel is asserted is a party or is in privity with a party to the prior adjudication. *Hayes*, 399 Ill. App. 3d at 1161. Despite such difference between the two doctrines, Illinois courts have recognized that "both branches serve the same purpose, that is, promoting judicial economy and preventing repetitive litigation[.]" *Id.*

Appellate courts have stated that neither *res judicata* nor collateral applies to ICC orders. *See, e.g., Commonwealth Edison Co. v. Illinois Commerce Comm'n.*, (Ill. App. 2nd Dist. 2010) 405 Ill. App. 3d 389, 405-08, 937 N.E.2d 685.[3] However, AT&T does not assert *res judicata* or collateral estoppel. Rather, AT&T argues that Cbeyond's challenge to the Category 1 charges is barred by the collateral attack doctrine. Motion at 13.

The collateral attack doctrine, in and of itself, is a concept which may enable the losing party to collaterally attack, under limited circumstances, the legality of court's prior judgment in later, separate proceeding. *See, e.g., Buford v. Chief, Park Dist. Police*, (1960) 18 Ill. 2d 265, 270, 164 N.E.2d 57, concluding that a collateral attack on a judgment is an attempt to impeach that judgment in an action other than the action in which it was rendered; *see also Mashal v. City of Chicago,* (1st Dist. 2011) 408 Ill. App. 3d 817, 825-26, 946 N.E.2d 508. Where the rendering court lacks the inherent power to decide a case, for instance, the losing party may collaterally attack the validity of the judgment entered. *Buford*, 164 N.E.2d at 60 ("[J]udgment entered by a court in which there is a total want of jurisdiction or which lacks inherent power to make or enter the particular order involved is void and subject to collateral attack"). However, it is well-settled law in Illinois that, absent court's lack of jurisdiction or fraud, a duly-entered judgment is not subject to collateral attack. *See, e.g., Hooks v. Bonner*, (1st Dist. 1989)

[3] But see *People ex rel. Madigan v. Illinois Commerce Commission,* 2012 IL App (2d) 100024, 100032-33, 967 N.E.2d 863 concluding that collateral estoppel barred Commonwealth Edison Company from asserting the propriety of certain riders because these riders had been previously found to be invalid by the Appellate Court.

187 Ill. App. 3d 944, 955, 543 N.E.2d 953 ("[A] judgment may not be collaterally attacked except where the court lacked jurisdiction or its jurisdiction was based upon fraud, accident or mistake".

AT&T's contention that Cbeyond is "barred by the collateral attack doctrine" is somewhat misleading. A more precise way for AT&T to articulate its argument would be that Cbeyond's challenge to the Category 1 charges constitutes an "impermissible" collateral attack. AT&T cites to Illinois courts' decision as well as an ICC order. Motion at 13, quoting C*itizens for a Better Env't v. Illinois Wood Energy Partners,* 1995 WL 17200504, finding that the complaint is a collateral attack on a duly entered Order to which no appeal was taken); *Albin v. Illinois Commerce Commission*, (4th Dist. 1980) 87 Ill. App. 3d 434, 439-40, 408 N.E.2d 1145 .

Thus, the key question here is whether Cbeyond in this docket attempts to "impeach," the Commission's order in Docket 10-0188. In other words, the question is whether there is any collateral attack to begin with, and if so, whether such attack by Cbeyond is impermissible, barring Cbeyond from raising the issue of the Category 1 charges.

The August 31, 2012 ALJ ruling dismissing AT&T's First Amended Complaint rejected AT&T's argument that Cbeyond could not challenge the issue of the Category 1 CCC rates under the collateral attack doctrine. Based on the parties' briefs at that time and the allegations in Cbeyond's First Amended Complaint, the ruling found there that Cbeyond's First Amended Complaint was "only disputing Clear Channel Capability rates for situations where the charge is levied on orders for new DS1/EEL circuits." However, a reading of Cbeyond's latest Second Amended Complaint makes it clear that Cbeyond *is now disputing* what AT&T calls the Category 1 charges. Thus, it is necessary to discuss whether Cbeyond's challenge to Category 1 charges, which are the CCC charges associated with "rearrangement" of existing DS1/DS1 EELs, including orders of new DS1 circuits riding on the existing EELs – constitutes an impermissible collateral attack upon the Commission's final Order in Docket 10-0188.

Cbeyond argues that the collateral attack doctrine does not apply because Cbeyond is not attacking the final Order in Docket 10-0188. Cbeyond Response at 11. However, Cbeyond, in its latest Complaint, *is* attacking the Commission order in Docket 10-0188. No matter how Cbeyond downplays the issue of the Category 1 charges raised in Docket 10-0188, the manifest truth is that this issue – the CCC charges levied upon *orders of new circuits in the context of rearrangement of existing* DS1/DS1 EEL, such as, orders of new DS1 circuits *riding on* the existing EEL – was an issue in 10-0188. Motion at 14; Response at 9. In the Final Order in Docket 10-0188, the Commission concluded that "AT&T has provided Cbeyond with EELs and EEL rearrangements according to the rates and terms of the ICA," Ex. 1 to Motion at 28, 33, and concluding that "Cbeyond has not shown that AT&T has violated the parties' ICA."

In essence, the final Order in Docket 10-0188 dismissed all of Cbeyond's claims, concluding that Cbeyond did not establish a breach of contract or of any law. (*See,* Ex. 1 to Motion generally). Necessarily, this conclusion is an adjudication on the merits of all

of Cbeyond's claims, including the Category 1 charges that it contests here, irrespective of whether that Order contained a specific discussion of the Category 1 charges.

Cbeyond asserts *Lefton Iron & Metal Co. v. Illinois Commerce Comm'n.,* (1st Dist. 1988) 174 Ill. App. 3d 1049, 1053, 529 N.E. 2d 610, for the proposition that there must be findings of fact and conclusions of law sufficient for appellate review. Response at 14-16. This is undoubtedly true. But here, there was an Order dismissing the entire matter in Docket 10-0188. Dismissal of the entire matter establishes that every issue in that Docket was dismissed. Whether the final Order in that Docket is sufficient for appellate review is an entirely unrelated issue.

In fact, *Lefton Iron & Metal* only demonstrates why Cbeyond's argument is erroneous. Lefton, on appeal from a final Commission Order, argued that the Commission's findings were not explained sufficiently to permit a reviewing court to understand or evaluate the basis of its actions. The Appellate Court disagreed, ruling that the Commission is not required to make particular findings as to each evidentiary matter or claim. *Lefton Iron & Metal,* 174 Ill. App. 3d at 1055-56. *Lefton Iron & Metal* makes it clear that the final Order in Docket 10-0188 disposed of all of Cbeyond's Category 1 CCC claims.

It should be pointed out that, upon issuance of the final Order in Docket 10-0188, Cbeyond had avenues open to it, through which, it could have sought clarification of that Order or it could have contested any portion of that Order. It could have presented a Motion for Reconsideration or an Application for Rehearing. It also could have appealed that Order. It did not. Now, Cbeyond is left with a final Order in Docket 10-0188 dismissing Cbeyond's Category 1 charges. Cbeyond must live with the effect of that decision.

Cbeyond contends that it is not attacking the final Order in Docket 10-0188. Response at 13. However, the fact that this Commission must now review that Order due to the arguments that Cbeyond raises is indicia that Cbeyond is attacking that Order. Additionally, the fact that Cbeyond now asserts the due process notion that the final Order in that Docket was not sufficient regarding Cbeyond's Category 1 issue is also indicia that Cbeyond is indeed attacking that Order.

Regarding application of the collateral attack defense, there is no issue concerning lack of jurisdiction by the Commission or fraud in Docket 10-0188. Cbeyond's challenge to the Category 1 charges is therefore an impermissible collateral attack. *See Hooks*, 187 Ill App 3d at 955, concluding that "[A] judgment may not be collaterally attacked except where the court lacked jurisdiction or its jurisdiction was based upon fraud, accident or mistake." The Commission further notes that dismissing Cbeyond's challenge to the Category 1 charges furthers the public policy of discouraging piecemeal litigation. *See, e.g., Dubina v. Mesirow Realty Development,* (1997) 178 Ill. 2d 496, 507, 687 N.E.2d 871. The courts do not favor re-litigation of that which could have been addressed in earlier-filed litigation. *Id.* Further, allowing Cbeyond to challenge the Category 1 charges is virtually tantamount to permitting

Cbeyond to circumvent and disobey the Commission Order in Docket 10-0188. As AT&T points out, Cbeyond's position defeats the purpose of the appellate procedure. AT&T's Motion is granted as to Category 1 charges in Counts I through IV.

2. That Disputing the Legality of Category 1 Charges Exceeds the Authority Granted to Cbeyond in the August 31, 2012 ALJ Ruling

AT&T also argues that, when asserting Category 1 claims, Cbeyond exceeded the authority granted to it when the ALJ Ruling of August 31, 2012, allowed Cbeyond leave to file another Amended Complaint. This argument is procedurally incorrect. As is always the case in this type of situation, Cbeyond was free to make any claim it desired, as long as it could establish a legal claim. There was and indeed there could be no limitation on what claims that Cbeyond could file.

However, even a cursory reading of the arguments presented in AT&T's previously-filed Motion to Dismiss Cbeyond's First Amended Complaint, as well as the discussion in the ALJ Ruling of August 31, 2012, made it clear that this Commission does not have the legal authority to re-litigate what was already decided in Docket 10-0188.

~~Cbeyond additionally contends that the ALJ Ruling of August 31, 2012 incorrectly concluded that Cbeyond only asserted Category 2 charges. Cbeyond Response at 8. This argument ignores the fact that Cbeyond failed to assert its right to challenge any mistake in that Ruling (*e.g.,* by filing a Motion for Reconsideration). Left unchallenged as it was, Cbeyond cannot now claim that the August 31, 2012 ALJ Ruling was erroneous. This Commission encourages both parties to adhere to this very basic tenet of Civil Procedure.~~

3. That The Parties' Interconnection Agreement (their "ICA") Controls The Billing Dispute In Question, Not State Or Federal Law

Additionally, AT&T presents the Section 2-619 argument regarding Counts I, II, and III of the Complaint – allegations that AT&T has violated the Public Utilities Act (the "PUA") – should be dismissed as to both Category 1 and Category 2 charges, because "the Complaint must be decided, if at all, by reference to the parties' ICA." Motion at 19. AT&T argues that the Commission's role is to determine whether AT&T has complied with the ICA and, if it has not, to order AT&T Illinois to comply." Motion at 4. AT&T does not specifically point out under which one of the nine grounds for dismissal in Section 2-619(a) it raises such argument. Nonetheless, AT&T's Motion seems to imply that the presence of the parties' ICA is an "affirmative matter" under Section 2-619(a)(9), which defeats Cbeyond's claim that AT&T has violated the PUA. Motion at 2, 11, 19-22. Because it has already been determined that Cbeyond's challenge to the Category 1 charges constitutes an impermissible collateral attack, the only issue to be determined here is whether the presence of the parties' ICA should warrant dismissal of Cbeyond's allegation that AT&T has violated the PUA when it billed Cbeyond "CCC

charges associated with the initial provisioning of new DS1/DS1 EELs" – the Category 2 charges.

The fact that there is a binding contract between the parties in itself should not be deemed an affirmative matter defeating Cbeyond's claim. If AT&T adhered to the ICA between the parties, then it arguably did not violate the PUA provisions cited by Cbeyond. However, if AT&T acted outside the ICA, then it can violate the PUA – and the ICA would not, indeed could not, act as an affirmative matter under Section 2-619(a)(9). So the threshold question is whether AT&T breached the contract (Count IV). If Count IV survives AT&T's Motion to Dismiss, then we must leave our determination regarding the PUA counts, if properly pled, to the outcome of the case regarding Count IV – the breach of contract claim.

~~However,~~Next, AT&T has asserted that the specific pricing in Section 9.2.7.7.5 of the parties' ICA sets forth the price for Clear Channel Capability, which, it states was followed with respect to the charges imposed upon Cbeyond. AT&T Reply at 14-15. This argument fails both as a procedural matter as well as a legal matter. First, without the affidavit required by 735 ILCS 5/2-619(a), the evidence put forth by AT&T is procedurally improper. AT&T expressly states that "Cbeyond's Complaint does not address the only ICA provisions that are relevant . . ." AT&T Motion at page 23. As stated in the "Applicable Legal Standards" herein, if the grounds for a Section 2-619 motion "do not appear on the face of the pleading attacked, such motion shall be supported by affidavit." 735 ILCS 5/2-619(a). No such affidavit is attached. Because AT&T's 619 Motion to Dismiss relies on ICA provisions not in the Complaint (the pleading being attacked), without the required affidavit, it is procedurally improper.[4]

Secondly, even if AT&T raised this theory in a procedurally proper way, it is legally improper at this stage in the proceeding. At this stage, the Complaint's factual allegations are deemed true.[5] As such, there exists a conflict between one set of contractual provisions which state that the transport service must be provided at TELRIC[6] (which doesn't allow for double-recovery) and the provision AT&T points to, which states the line coding service is available for an additional fee (but would create a double-recovery in violation of TELRIC).[7] That conflict creates an ambiguity which cannot be resolved in a Motion to Dismiss. *Hubbard Street Lofts v. Inland Bank,* 2011 IL App (1st) 102640, 102651, 963 N.E.2d 262)("It is well-established that if a contract is ambiguous, it presents a question of fact and cannot be decided on a motion to dismiss.").[8] So whether AT&T's theory was presented in a procedurally acceptable format or not, it is premature in the context of a Motion to Dismiss. Accordingly, AT&T's Motion to Dismiss Counts I through IV on the basis of the ICA is denied as it applies to Category 2 charges.

~~Cbeyond does not dispute the validity of this contract or the applicability of this particular provision. Instead, Cbeyond asserts that general provisions in the parties'~~

[4] Despite the normal mandatory treatment of the term "shall" in a procedural rule, Illinois courts have ruled that failure to file the required affidavit is not necessarily fatal to a defendant's motion . *Doe v. Montessori School of Lake Forest*, 287 Ill.App.3d 289, 296, 223 Ill.Dec. 74, 678 N.E.2d 1082 (1997).

[5] *Heastie v. Roberts*, (2007) 226 Ill. 2d 515, 530, 877 N.E.2d 1064; *Storm & Associates, Ltd. v. Cuculich*, (1st Dist. 1988) 298 Ill. App. 3d 1040, 1057, 700 N.E.2d 202..

6 Complaint at ¶ 37.

[7] Complaint at ¶¶ 37and 40; AT&T Motion at page 23.

[8] *See also, Quake Constr. v. American Airlines*, 141 Ill.2d 281, 565 N.E.2d 990 (Ill. 1990).

~~ICA determine the price of Category 1 charges. *See,* Cbeyond Response at 20-21. However, it is well-settled that when a contractual ambiguity exists, the more specific provision governs over any general provisions. *See, e.g., Nationwide Mutual Fire Ins. Co. v. T and N Master Builder and Renovators,* 2011 IL App (2d) 101143, 101153, 959 N.E. 2d 201; *Hubbard Street Lofts v. Inland Bank,* 2011 IL App (1st) 102640, 102651, 963 N.E.2d 262. While Cbeyond asserts that the more general provisions were negotiated after the specific pricing provisions that AT&T asserts, it cites no law establishing that this specific pricing provision must not be applied here. *See, e.g.,* Cbeyond Response at 20-21.~~

~~Further, there is no evidence indicating that Cbeyond is not able to re-negotiate the terms of that contract. This is further indicia that AT&T has not breached that contract. Therefore, the Commission grants dismissal Counts II, III and IV based upon this argument~~

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4. That the Violation Of Section 13-801(g) Claim Should Be Dismissed Because as an "Electing Provider," AT&T Is Not Subject To Section 13-801

In its Section 2-619 arguments, AT&T argues that Count II, the violation of Section 13-801(g) claim, should be dismissed for another reason, because as an "Electing Provider" pursuant to Section 13-506.2 of the PUA, it is not subject to Section 13-801. Again, having determined that the Category 1 charges cannot be re-litigated here, it is unnecessary to address Category 1 charges with regard to this argument. Therefore, this ruling only addresses the propriety of what AT&T calls the Category 2 charges here.

The pertinent part of Section 13-801(a) upon which AT&T relies reads: "A telecommunications carrier *not subject to* regulation under an alternative regulation plan pursuant to *Section 13-506.1* of this Act *shall not be subject to the provisions of this Section*, to the extent that this Section imposes requirements or obligations upon the telecommunications carrier that exceed or are more stringent than those obligations imposed by Section 251 of the federal Telecommunications Act of 1996 and regulations promulgated thereunder." 220 ILCS 5/13-801(a)(emphasis added); *see also* 220 ILCS 5/13-506.2.[9] In support of the argument that it is an "Electing Provider" that is not governed by Section 13-506.1, and thus is exempt from Section 13-801(g), AT&T asserts that it "filed its Notice of Election for Market Regulation on a state-wide basis on June 28, 2010 in accordance with Section 13-506.2(b)." Motion at 19, citing Ex. 16 (notice of election).

[9] **220 ILCS 5/13-506.2(a)(1): Definitions.** "'Electing Provider' means a telecommunications carrier that is subject to either rate regulation pursuant to Section 13-504 or Section 13-505 or alternative regulation pursuant to Section 13-506.1 and that elects to have the rates, terms, and conditions of its competitive retail telecommunications services solely determined and regulated pursuant to the terms of this Article."
220 ILCS 5/13-506.2(b): Election for market regulation. "Notwithstanding any other provision of this Act, an Electing Provider may elect to have the rates, terms, and conditions of its competitive retail telecommunications services solely determinate and regulated pursuant to the terms of this Section by filing written notice of the terms of this election for market regulation with the Commission."

AT&T's argument here seems to be flawed on its face. AT&T erroneously equates "*a telecommunications carrier not subject to regulation under an alternative regulation plan pursuant to Section 13-506.1"* with an "*Electing Provider."* Although AT&T is correct in saying that the former is the prerequisite for AT&T to be exempt from Section 13-801, obtaining the status of an "Electing Provider" does not automatically grant AT&T any immunity from Section 13-801.

Section 13-506.2 defines an "Electing Provider" as a "telecommunications carrier that is subject to ***either*** rate regulation pursuant to Section 13-504 ***or*** Section 13-505 ***or*** alternative regulation pursuant to Section 13-506.1 ***and*** that elects to have the rates, terms, and conditions of its competitive retail telecommunications services solely determined and regulated pursuant to the terms of this Article." 220 ILCS 5/13-506.2(a)(1)(emphasis added). Therefore, the very first hurdle which AT&T must pass is any showing that AT&T is a telecommunications carrier that is "subject to ***either*** rate regulation pursuant to Section 13-504 ***or*** Section 13-505," ***but not*** subject to alternative regulation pursuant to Section 13-506.1. Only then can AT&T's contention that it is not subject to the Section 13-801 be determined. Accordingly, based upon the information that AT&T provided, this argument lacks merit. This Commission declines to determine that this claim should be dismissed based upon the arguments that AT&T presented regarding this issue.

c. The Section 2-615 Arguments

A Section 2-615 motion allows a respondent to attack the sufficiency of a complaint and to determine whether a petitioner stated a claim upon which relief can be granted. *Storm & Associates, Ltd.,* 298 Ill App 3d at 1045-46. Also, "factual defenses are not available under a motion to dismiss brought pursuant to section 2-615." Thus, the trier of fact may consider the legal sufficiency of the complaint based only on the allegation in the complaint and not upon affidavits or other supporting materials." *Premier Elec. Const. Co.*, 115 Ill. App. 3d at 42-43.

1. That Counts I, II, And III Should Be Dismissed Because Cbeyond Did Not Revise Those Three Counts Pursuant To The ALJ's Ruling On August 31, 2012

AT&T also argues that Counts I, II, and III should be dismissed because Cbeyond's Second Amended Complaint did not revise its claims to add facts since the ALJ ruling on August 31, 2012 determining that these Counts in the First Amended Complaint were factually insufficient. (Motion at 32). In support of this argument, AT&T points out the part of the ALJ ruling dismissing dismissed Counts I, II, and III, with leave to amend, stated that "[t]here are simply not enough facts alleged by Cbeyond in the Amended Complaint" for the ALJ to determine the sufficiency of the pleading.

~~While it is true that Cbeyond has added a quotation in its latest version of its Complaint (Comp. ¶ 26), attempting to show why there should not be any CCC charge by AT&T "[i]f CCC is provisioned at the time that a DS1 service is provisioned," such~~

~~quotation is *not* new to the Commission, contrary to Cbeyond's assertion that it "provided additional evidence." *See*, Response at 22-24. In fact, paragraph 26 of the latest Complaint which Cbeyond claims to be the "additional evidence" contains the exact same wording of paragraph 15 of the First Amended Complaint. *See also* the First Amended Comp. at ¶ 14 (bold lines). Cbeyond has not made any material changes to those three counts. As the ALJ Ruling of August 31, 2012 pointed out, the allegations in these counts do not state facts indicating that AT&T breached any law.~~

Unfortunately, AT&T's Motion fails to identify any specific defect in Cbeyond's complaint. Under 735 ILCS 5/2-615(a), a motion to dismiss must "point out specifically the defects complained of . . .". If Cbeyond failed to plead a fact necessary to one of the counts it brought, AT&T's Motion did not specify what factual deficiency warrants dismissal. When a motion made under 2-615 challenges the factual sufficiency of a claims, it should, by each count challenged, assert the elements required to plead under Illinois law or Commission rule, and then specifically identify what element is unsupported by factual allegation. Neither Cbeyond nor AT&T have provided any assertion of those specific elements. As the movant, AT&T bears the burden in the first instance of identifying the specific defect in Cbeyond's complaint. Its Motion fails in that burden.

While the insufficiency of AT&T's Motion is enough to deny it, in light of the ALJ's prior ruling it is important to determine whether Cbeyond's complaint is defective as to these PUA counts. Under Illinois law, a complaint is deficient when it fails to allege facts necessary for the plaintiff to recover. *Heastie v. Roberts*, 226 Ill. 2d 515, 530, 877 N.E.2d 1064 (2007); *Storm & Associates, Ltd. v. Cuculich*, 298 Ill. App. 3d 1040, 1057, 700 N.E.2d 202 (1st Dist.1988). So to determine the sufficiency of Cbeyond's complaint as to Counts I through III, the Commission must analyze the elements required for the alleged violations of law, and then determine whether Cbeyond plead facts fulfilling each element. Such facts, under the standard of review, shall be construed in a light most favorable to Cbeyond. At this stage, any inferences from factual allegations, if any are to be drawn, are also drawn in Cbeyond's favor. However, mere factual conclusions (e.g. "the defendant breached the contract") are not enough to sustain a complaint – the facts must support each element of a claim. *Id.*

Count I

Taking each count in order: Count I alleges a violation of PUC Section 13-514(10). Cbeyond provided an accurate quotation from the portion of the PUA Cbeyond alleges is violated for its Count I in its Second Amended Complaint at 12:

> "Section 13-514 (10) of the Illinois Public Utilities Act (PUA) provides, in relevant part, that a telecommunications carrier violates Illinois law by "unreasonably failing to offer network elements that the Commission or the Federal Communications Commission has determined must be offered on an unbundled basis to another telecommunications carrier **in a manner consistent with the Commission's** or Federal Communications Commission's **orders** or rules requiring such offerings." 220 ILCS 5/13-514 (emphasis in Cbeyond 2nd Am. Complaint)." 2nd Am. Complaint at 12.

So the elements of a violation of Section 13-514 (10) are (in the context of this case):

(1) That the defendant is a "telecommunications carrier";
(2) offering "network elements" that the Commission (or FCC) has determined must be offered on an unbundled basis;
(3) to another telecommunications carrier;
(4) that the "telecommunications carrier" is failing to offer those "network elements" in a manner consistent with the Commission's (or FCC's) orders and rules;
(5) that failure is "unreasonable"; and
(6) a carrier must also fulfill the requirements of PUA Section 13-515(c) before filing an complaint under this PUA section.

Turning to Cbeyond's Second Amended Complaint, Count I (which adopts the general allegations from complaint paragraphs 1-38) the Commission must see facts supporting each element above.

(1) Cbeyond sufficiently pleads facts supporting the element that AT&T is a "telecommunications carrier." 2nd Am. Complaint at 2.
(2) Cbeyond pleads facts supporting the element that AT&T is offering "network elements" that the FCC and Commission require to be offered at 2nd Am. Complaint 9, 10, 34-37.
(3) Cbeyond sufficiently pleads facts supporting the element that Cbeyond is a "telecommunications carrier." 2nd Am. Complaint at 1.
(4) Cbeyond also, given the favorable inferences drawn during consideration of this Motion, sufficiently pleads facts supporting the element that AT&T is failing to offer those "network elements" in a manner consistent with the Commission's (or FCC's) orders and rules. 2nd Am. Complaint at 15-26 (the TELRIC UNE rate for the UNE transport at issue in the case, which was developed in ICC Docket 02-0864 includes the CCC activities when CCC is ordered at the same time as the UNE transport); that it was not the intention of the Commission in Docket 02-0864 to have the CCC rate applied to transport when it is ordered as part of the transport UNE. 2nd Am. Complaint at 15-27. That the alleged misapplication is continuing. 2nd Am. Complaint at 31 and 38. And that it violates FCC rules (and the parties ICA codifying those rules) to charge more than the Commission approved TELRIC rate developed in ICC Docket 02-0864 for the transport UNE. 2nd Am. Complaint at 35-37 and 40.
(5) Cbeyond alleges facts supporting the element that AT&T's billings are unreasonable. 2nd Am. Complaint at 31, 38 and 40.
(6) And finally, Cbeyond plead compliance with PUA Section 13-515(c). 2nd Am. Complaint at 4.

A cause should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover. *Burdinie v. Village of Glendale Heights* (1990), 139 Ill.2d 501, 504, 152 Ill.Dec. 121, 565 N.E.2d 654; *Payne v. Mill Race Inn* (1987), 152 Ill.App.3d 269, 275, 105 Ill.Dec. 324, 504 N.E.2d 193. Given the facts alleged in Cbeyond's Second Amended Complaint, it appears that

Cbeyond has sufficiently plead facts to avoid dismissal of its Count I claim at this early stage in the docket. AT&T's Motion pursuant to 735 ILCS 5/2-615 as to Count I is, therefore, denied.

Count II

Cbeyond's Count II alleges a violation of PUA Section 13-801(g), which provides in relevant part:

> Section 13-801(g) of the Illinois Public Utilities Act requires that "Interconnection, collocation, network elements, and operations support systems shall be provided by the incumbent local exchange carrier to requesting telecommunications carriers at cost based rates . . ." 220 ILCS 5/13-801(g).

The elements required for a complaint under 13-801(g) are:

(1) That "Interconnection, collocation, network elements, and operations support systems" are being provided;
(2) "by the incumbent local exchange carrier";
(3) to "requesting telecommunications carriers"
(4) at a rate that is not "cost-based"

Cbeyond's Second Amended Complaint fulfilled the pleading requirements set-out as numbers 1 through 3 above as part of pleading the elements for Count I, so the only element at issue is whether the "rate" is not "cost-based." Cbeyond certainly pleads sufficient facts to support an allegation that the combination of the CCC rate and the UNE transport rate exceed TELRIC – at least when CCC is ordered and provisioned at the same time as the transport UNE. 2nd Am. Complaint at 15-26. This begs two questions: (a) Should Section 13-801(g)'s reference to "rate" include a combination of rates, which when charged together exceed a single "cost based" rate for a network element; and (b) is the term "cost-based" the same as TELRIC?

"In construing a statutory provision not yet judicially interpreted, a court is guided by both the plain meaning of the language in the statute as well as legislative intent." *Allstate Ins. Co. v. Winnebago County Fair Assoc*., (1985) 475 N.E.2d 230,233, 131 Ill.App.3d 225, 228. It is clear from the statute itself and the legislative history of the statute that 13-801 was intended to be interpreted in a light most favorable to the development of competition in Illinois. 220 ILCS 5/13-801(a) provides that "The Commission shall require the incumbent local exchange carrier to provide interconnection, collocation, and network elements in any manner technically feasible to the fullest extent possible to implement the maximum development of competitive telecommunications services offerings."

The legislative history makes it equally clear that Section 801 was intended to open telecommunications markets to competitors. During the debate on the final bill in the House of Representatives, Section 801 was repeatedly described as "the part" of the bill intended to be market-opening. For instance, Representative Hamos, in

answering questions on the day the bill was adopted by the Illinois House had this to say:

> The problem here has been that because we have two major companies, incumbents, who own the infrastructure, it has been very difficult for newcomers, for the competitors to come to Illinois and be able to access that infrastructure in order to provide services to us. This Bill, especially one very important part of this Bill called Section 801, in fact, will open the market in Illinois.
>
> . . .
>
> There are some Sections of the Bill, for example, the Section 801 that I had referred to, which is really the market opening portion of this Bill . . . .
>
> Transcription Debate, 69th Legislative Day, May 31, 2001, State of Illinois 92nd General Assembly, House of Representatives, pages 151 and 158.

Give the language of the statute and the legislative history described above, the Commission considers it improbable that the General Assembly intended the prohibition on charging more than "cost-based" rates to be so narrowly construed as to allow an incumbent to circumvent it by charging a combination of rates for a single network element which, when combined, results in more than the "cost-based" rate established by the Commission for that element. Network elements are the piece-parts of the incumbent network Competitive Local Exchange Carriers use to compete. It would be damaging to competition to allow an incumbent to combine rates for a single network element that results in a charge in excess of the "cost-based" rate for that element. The Commission finds that Section 801(g)'s requirement that an incumbent only charge "cost-based" rates for a network element is violated if the incumbent charges several rates for a single network element, if in doing so the resulting combined rate exceeds a Commission-established "cost-based" rate for that network element.

Obviously, an incumbent can charge a combination of rates for a combination of services or network elements when it provides those services or network elements. What an incumbent cannot do is recover twice for a network element it provides once – or recover, in total, more than the Commission-established rate for a particular service or network element. As a consequence, Cbeyond's factual allegation, described herein, that AT&T is violating Section 13-801(g) by improperly charging a combination of rates is sufficient to withstand a Motion to Dismiss pursuant to 735 ILCS 5/2-615.

The remaining question is whether the reference to "cost-based" rate is the same as TELRIC. The Commission need not, however, specifically reach that question. 220 ILCS 5/13-801(a) limits the meaning of the obligations within Section 801 to the identical limits under Section 251 of the federal Telecommunications Act and regulations implementing it. As such, irrespective of what "cost-based" may mean, in the context of Section 801, it means at a minimum the obligations under Section 251 of the Telecommunications Act – or TELRIC. The "cost-based" rate for a network element

under Section 251 of the federal Act is TELRIC. So in this circumstance "cost-based" means TELRIC. Cbeyond pled sufficient facts, under the favorable inferences required here, to allege that AT&T is charging more than the TELRIC rate established by the Commission for UNE transport. Cbeyond has met its pleading obligations for the last element of Count II. AT&T's Motion to Dismiss Count II pursuant to 735 ILCS 5/2-615 is, therefore, denied.

Count III

Count III of Cbeyond's Complaint is made pursuant to 220 ILCS 5/9-250, which provides:

> The Commission shall have power . . . to investigate a single rate or other charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates or other charges, classifications, rules, regulations, contracts and practices, or any thereof of any public utility, and to establish new rates or other charges, classifications, rules, regulations, contracts or practices or schedule or schedules, in lieu thereof. 220 ILCS 5/9-250

While this provision certainly gives the Commission authority, it does not appear to impose an obligation on either AT&T or give a right to Cbeyond. Cbeyond's complaint does not indicate how this statute interacts with the facts of the case or provides relief to Cbeyond – even if the investigation of the rate turned up malfeasance by AT&T. Accordingly, this Count is dismissed with leave to amend.

~~Accordingly, AT&T's Section 2-615 motion is granted with regard to Counts I, II, and III (the violation of the PUA claims) of the Complaint.~~

2. That Count II Should Be Dismissed on Additional Grounds Because Cbeyond Fails To Allege That AT&T Engaged In Conduct In Violation of Section 13-801 Of The PUA.

AT&T raised one additional argument under Section 2-615 -- that Count II of the Complaint fails to allege that AT&T violated Section 13-801, which requires that "[i]nterconnection, collocation, network elements, and operations support systems shall be provided by the incumbent local exchange carrier to requesting telecommunications carriers at cost based rates." Motion at 33, citing 220 ILCS 5/13-801(g). For the reasons provided in the Commission's denial of AT&T's 2-615 Motion regarding Count II, this portion of AT&T's Motion is also denied. ~~Because the heart of Cbeyond's averment centers on whether CCC rate should be applied at all when Cbeyond either requests: (1) new DS1 circuits in the context of already installed DS1 EELs, or (2) initial provisioning of new DS1 EELs, AT&T argues that Section 13-801 which addresses "cost based rates" has no relevance to Cbeyond's allegation.~~

~~It appears that AT&T has raised a valid point in this argument. The question of whether CCC rate should be applied to a particular service has no bearing whether AT&T has complied with Section 13-801. This is true because the facts alleged by~~

~~Cbeyond do not concern whether AT&T's CCC rates are cost-based. Accordingly, because Cbeyond failed to state a claim In Count II for which relief can be granted, AT&T's Section 2-615 Motion to Dismiss Count II is granted for this additional reason.~~

In summation, AT&T's Motion to dismiss is granted, in the manner set forth herein, and Counts I through IV of Cbeyond's Second Amended Complaint ~~is~~ are dismissed as to Category 1 charges, with prejudice. AT&T's Motion to Dismiss Counts I, II and IV is denied as it pertains to Category 2 charges.

III. Finding and Ordering Paragraphs

The Commission, having given due consideration to the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) Cbeyond Communications, LLC, is a duly-licensed telecommunications service provider in Illinois;

(2) Illinois Bell Telephone Company, d/b/a AT&T Illinois, is an Illinois corporation engaged in the business of providing telecommunications services to the general public in the State of Illinois; as such it is a "telecommunications carrier within the meaning of Section 13-202 of the Illinois Public Utilities Act;

(3) the Commission has subject-matter jurisdiction and jurisdiction over Illinois Bell Telephone company and Cbeyond Communications, LLC;

(4) as is set forth herein, Cbeyond Communications, LLC, has either not set forth facts establishing that it has a cause of action with regard to certain claims, or, it has not established that AT&T's affirmative defenses bar assertion of certain claims;

(5) ~~(5)~~ for the reasons stated herein, Counts I through IV of Cbeyond's Second Amended Complaint are dismissed as to Category 1 charges, with prejudice.

(6) for the reasons stated herein, AT&T's Motion to Dismiss Count III is granted without prejudice. Cbeyond is provided thirty (30) days to correct the factual deficiency identified in this Order by amended complaint.

for the reasons stated herein, AT&T's Motion to Dismiss Counts I, II and IV is denied as it pertains to Category 2 charges.~~Cbeyond Communications, LLC's complaint is dismissed, with prejudice.~~

IT IS THEREFORE ORDERED that ~~the~~ Counts I through IV of Cbeyond's Second Amended Complaint are dismissed as to Category 1 charges, with prejudice. Count II of Cbeyond's Second Amended Complaint is dismissed with leave to amend. AT&T's Combined Motion to Dismiss Counts I, II and IV is denied as to Category 2 charges.~~Complaint filed by Cbeyond Communications, LLC is dismissed with prejudice~~ for the reasons stated herein.

IT IS FURTHER ORDERED that the docket remain open, and the case be remanded to the ALJ and proceed consistent with this order

~~IT IS FURTHER ORDERED that, subject to Section 10-0113 of the Public Utilities Act, this Order is final; it is not subject to the Administrative Review Law.~~

~~Dated: January 22, 2013~~
~~Claudia E. Sainsot~~
~~Administrative Law Judge~~
~~Illinois Commerce Commission~~

~~Brief on Exception due to be filed and served by: February 4, 2013~~
~~Reply Briefs on Exception, if any, due to be filed and served by February 14, 2013.~~